

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Casa Ermelinda Freitas-Vinhos, LDA

Serial No. 79263285

Alexander Lazouski of Lazouski IP LLC,
for Casa Ermelinda Freitas-Vinhos, LDA.

David Elton, Trademark Examining Attorney, Law Office 106,
Mary Sparrow, Managing Attorney.

Before Wolfson, Pologeorgis, and Dunn,
Administrative Trademark Judges.

Opinion by Dunn, Administrative Trademark Judge:

Casa Ermelinda Freitas-Vinhos, LDA (Applicant) seeks registration on the Principal Register of the mark SAND CREEK (in standard characters) for goods ultimately amended to “wine,” in International Class 33.¹

¹ Application Serial No. 79263285 filed May 6, 2019 is a request for an extension of protection based on an international registration under Section 66(a) of the Trademark Act, 15 U.S.C. 1141(a).

References to the application are to the downloadable .pdf version of documents available from the TSDR (Trademark Status and Document Retrieval) database. The TTABVue citations refer to the Board’s electronic docket, with the first number referring to the docket entry and the second number, if applicable, referring to the page within the entry.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods identified in the application, so resembles the mark SAND CREEK (in standard characters) for "Beer; Beer wort; Beer, ale and lager; Beer, ale, lager, stout, porter, shandy; Beers; Black beer; Brewed malt-based alcoholic beverage in the nature of a beer; Coffee-flavored beer; Flavored beers; Fruit-flavored beverages; Malt beer; Malt extracts for making beer; Malt wort; Pale beer; Porter," in International Class 32,² registered on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

We sustain the Examining Attorney's objection to the evidence first submitted with Applicant's brief. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), provides that "[t]he record in an application should be complete prior to the filing of an appeal" and "[e]vidence should not be filed with the Board after the filing of a notice of appeal." Evidence that Applicant did not submit during examination is untimely and will not be considered. *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018), *aff'd*, 777 F. App'x. 516 (Fed. Cir. 2019).

² Registration No. 4436025 issued November 19, 2013, Section 8 accepted. The registration also includes International Class 40 services, but these were not cited as a basis for the refusal.

I. LIKELIHOOD OF CONFUSION

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) (*DuPont*). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the goods and the similarities between the marks. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

A. Similarity or Dissimilarity of the Marks

The first *DuPont* factor requires consideration of “[t]he similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *DuPont*, 177 USPQ at 567. Applicant seeks to register the term SAND CREEK in standard characters, which is identical to the registered mark. As a result, the marks look and sound the same. As to connotation, neither Applicant nor the Examining Attorney contend or present any evidence that SAND CREEK has a particular connotation when applied to “wine” that is absent when applied to “beer” or Registrant’s other beverages, so we find that the connotation and overall commercial impression is identical when applied to the respective goods. *See In re*

Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1289–90 (Fed. Cir. 1984) (“This factor weighs heavily against applicant, as the two word marks are identical: MARTIN’S. MARTIN’S is not suggestive or descriptive of either bread or cheese.”). *Cf. Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (“Opposer’s COACH mark, when applied to fashion accessories is clearly either arbitrary or suggestive of carriage or travel accommodations [e.g., stagecoach, train, motor coach, etc.] thereby engendering the commercial impression of a traveling bag [e.g., a coach or carriage bag]. On the other hand, applicant’s COACH marks call to mind a tutor who prepares a student for an examination.”).

We disagree with Applicant’s argument that the sixth *DuPont* factor, which assesses the commercial strength of the registered mark as shown by “the number and nature of similar marks in use on similar goods,” demonstrates that there is no likelihood of confusion here.³ *See Juice Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (“evidence of third-party use bears on the strength or weakness of an opposer’s mark.”); *In re FCA US LLC*, 126 USPQ2d 1214 (TTAB 2018) (“Evidence of third-party use may reflect commercial weakness”). More specifically, we agree with the principle that evidence of extensive third-party use of a term, on the same or similar goods in the relevant marketplace, is probative of the term’s weakness as a trademark. *See In re Medline Indus., Inc.*, 2020 USPQ2d 10237, *11 n. 38 (TTAB 2020); *In re Morinaga Nyugyo Kabushiki*

³ 6 TTABVUE 6-7.

Kaisha, 120 USPQ2d 1738, 1745 (TTAB 2016); *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1565-1566 (TTAB 1996). However, based on the sparse evidence of third-party use in this record, we find that the evidence fails to demonstrate that the cited registered mark is weak.

Here, Applicant has provided webpages for a Colorado Springs, Colorado store named SAND CREEK LIQUORS; an Albany, New York store called SAND CREEK WINE & LIQUORS; a Hugo, Colorado distillery for single malt whiskey called SAND CREEK DISTILLERY; and a Missouri⁴ vineyard called SAND CREEK VINEYARD.⁵ This is not the type of extensive use which has been required to consider a mark commercially weak. *See Juice Generation, Inc. v. GS Enterprises LLC*, 115 USPQ2d at 1673 n.1 (twenty-six examples of third-party use with restaurant services or food products). A handful of third-party uses generally is not considered sufficient to make a term weak in the eyes of the consuming public. *See In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1636 (TTAB 2018) (“These five uses of WILLPOWER, while somewhat probative, are insufficient to “show that customers ... have been educated to distinguish between different ... marks on the basis of minute distinctions.”) (citation omitted); *In re I-Coat Co.*, 126 USPQ2d 1730, 1733 (TTAB 2018) (“unlike cases in which extensive evidence of third-party use and other evidence in the record was found to be ‘powerful on its face’ ... Applicant has presented, at most, three such

⁴ The webpage does not list a location but displays a phone number with a Missouri area code. *See In re Vehicle Information Network Inc.*, 32 USPQ2d 1542, 1543 (TTAB 1994) (“Area codes convey location”).

⁵ September 16, 2020 TSDR 10-16.

uses, well short of the volume of evidence found convincing”). In sum, we find the registered mark SAND CREEK for beer and the other listed beverages is entitled to the customary scope of protection.

Because the marks SAND CREEK are identical in appearance, pronunciation, connotation and commercial impression, and the term has not been shown to warrant a narrow scope of protection, this *DuPont* factor strongly favors finding a likelihood of confusion.

B. Similarity or Dissimilarity of the Goods and Channels of Trade

We turn to the similarity or dissimilarity of the respective goods and their channels of trade. The issue is not whether the goods will be confused with each other, but rather whether the public will be confused as to their source. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”). It is sufficient that the goods of the applicant and the registrant are related in some manner or that the conditions surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that, because of the marks used in connection therewith, would lead to the mistaken belief that they originate from the same source. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 14711, 1476 (Fed. Cir. 2000).

Here, we find an inherent relationship between Applicant’s goods “wine” and the registered goods “Beer; Beer wort; Beer, ale and lager; Beer, ale, lager, stout, porter, shandy; Beers; Black beer; Brewed malt-based alcoholic beverage in the nature of a

beer; Coffee-flavored beer; Flavored beers; Fruit-flavored beverages; Malt beer; Malt extracts for making beer; Malt wort; Pale beer; Porter.” Both include alcoholic beverages. *See In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003) (holding that malt liquor and tequila sold under the same mark would cause a likelihood of confusion). This single factor of overlap, that both wine and beer are beverages that have an alcoholic content, distinguishes this case from the following cases, which were cited by Applicant⁶, in which the food and drink compared were dissimilar in nature. *In re Mars, Inc.*, 222 USPQ 938 (Fed. Cir. 1984) (finding confusion unlikely for use of identical CANYON marks on citrus fruit and candy bars, respectively) and *Hi-Country Foods Corp. v. Hi-Country Beef Jerky*, 4 USPQ2d 1169 (TTAB 1987) (finding beef-based snack foods unrelated to fruit juices “even when sold under virtually identical trademarks” because these products are “different in character” and “would not normally be sold in the same sections of food stores...”).

When it comes to comparing different alcoholic beverages, the differences in the nature of the alcoholic beverage may be outweighed by evidence showing that they are inexpensive commodities, appeal to the same consumers, or are marketed in the same channels of trade. *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004) (tequila and beer and ale related); *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1826-1827 (TTAB 2015) (beer and alcoholic beverages except beer related); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261 (TTAB 2011) (wine and beer related). However, we agree with Applicant that

⁶ 6 TTABVUE 5.

there is no per se rule that all alcoholic beverages are related.⁷⁸ Nor is there a per se rule that alcoholic beverages are unrelated, and so we are not bound by previous decisions, precedential or unpublished, finding that, on the record in that particular case, particular alcoholic beverages are not related. Accordingly, we turn to the record evidence in this case.

In addition to the inherent relationship between wine and beer, we consider the record evidence which shows that wine and beer are goods which may emanate from a single source. The Examining Attorney submitted 32 use-based third-party registrations (Nos. 5326773, 5662013, 5551925, 5628791, 5644538, 5603137, 5733907, 5973378, 5733907, 5480757, 4588757, 4694631, 2350261, 3685473, 4380436, 3875505, 4136155, 4133934, 4464912, 4832965, 4887801, 4838384, 4896450, 5037342, 5287269, 5429141, 5217075, 5326773, 5225022, 5905455, 5957365, 5891000) for goods including wine and beer.⁹ “Third-party registrations which cover

⁷ 6 TTABVUE 5. In fact, there are no per se rules when it comes to any non-identical goods. See *Lloyd’s Food Products, Inc. v. Eli’s, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2030 (Fed. Cir. 1993) (“there is no per se rule about confusion where similar marks are used in connection with restaurant services and food products.”); *In re Country Oven, Inc.*, 2019 USPQ2d 443903, *14 (TTAB 2019) (“We of course recognize that there is no per se rule regarding the relatedness of goods and services.”); *The B.V.D. Licensing Corp. v. Rodriguez*, 83 USPQ2d 1500, 1506 (TTAB 2007) (Notwithstanding reported cases that found underwear and other clothing items to be related items, “[t]here is no per se rule, however, that such goods must be considered related.”). When assessing likelihood of confusion, each case must be decided on its own facts. *In re N.A.D. Inc.*, 754 F.2d 996, 224 USPQ 969, 971 (Fed. Cir. 1985); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009).

⁸ 6 TTABVUE 3.

⁹ July 25, 2019 Office Action TSDR 8-34; March 16, 2020 Office Action TSDR 10-11, 34-35, 53-54, 63-64, 74-75, 88-90, 94-122, 126-139, 142-149.

Because Applicant’s original description of goods included more than wine, the third-party registrations include a few registrations which do not include wine. We have omitted those registrations from our listing of the evidence on which we rely.

a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source.” *Ricardo Media, Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, *2 (TTAB 2019) (quoting *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d*, 864 F.2d 149 (Fed. Cir. 1988) (unpub.). *Accord In re I-Coat Co., LLC*, 126 USPQ2d at 1737 (third-party registrations support finding “optical lenses, namely, corrective lenses sold through eye care professionals” related to “spectacles, spectacle cases, spectacle lenses, spectacle settings, spectacle frames, glasses for sport, protective helmets for sports, binoculars, parts of these goods included in this class” and “ski glasses, ski goggles, goggles for sports, protective sport helmets; sunglasses, bags specifically adapted for protective helmets”).

Turning to the channels of trade, the record includes excerpts from the websites of eleven different entities that produce and sell both wine and beer,¹⁰ namely, Spring Gate in Pennsylvania, Abnormal Company of California, SchillingBridge Winery & Microbrewery of Nebraska, Skull Camp Brewing of North Carolina, Charleville Vineyard, Winery & Brewery of Missouri, Barrel Oak Winery and Farm Taphouse of Virginia, 2 Witches Winery & Brewing Co. of Virginia, Taylor Brooke of Connecticut, Rudbeckia Winery and Brewery of Michigan, Fenton Winery and Brewery of

¹⁰ March 16, 2020 Office Action TSDR 12-32, 37-51, 55-61, 65-72, 76-86, 151-162, 178-196.

Michigan, and Mac's Creek Winery and Brewery of Nebraska. The record also includes an article at vinepair.com titled Grape and Grain: Nine Winemakers That Are Also Brewing Craft Beer, which lists another nine combination-winery-and-brewery businesses.¹¹ This evidence is un rebutted.¹²

Finally, where, as in the application and cited registration, there are no restrictions on trade channels in the identification of goods, we must presume that the goods travel in all channels of trade appropriate for such goods. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1161; *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *6 (TTAB 2020). That is, whether or not Applicant's wine or the registered beverages actually come from the type of combination winery and brewery shown in the examples of third-party use, for the purposes of this comparison the unrestricted identification of goods in the application and registration does not preclude Applicant's wine or the registered beverages travelling in those channels of commerce.

Finally, it is important to note that where identical marks are involved, as is the case here, the degree of similarity between the goods that is required to support a finding of likelihood of confusion declines. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ("[E]ven when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source"). It is only necessary that there be a

¹¹ March 16, 2020 Office Action TSDR 163-177.

¹² While Applicant argues (6 TTABVue 5) that there are differences in how wine and beer are sold in other retail channels, Applicant submitted no evidence in support of this point.

“viable relationship between the goods” to support a finding of likelihood of confusion. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009); *In re Wilson*, 57 USPQ2d 1863, 1867 (TTAB 2001).

The evidence of record demonstrates that Applicant’s wine and Registrant’s “Beer; Beer wort; Beer, ale and lager; Beer, ale, lager, stout, porter, shandy; Beers; Black beer; Brewed malt-based alcoholic beverage in the nature of a beer; Coffee-flavored beer; Flavored beers; Fruit-flavored beverages; Malt beer; Malt extracts for making beer; Malt wort; Pale beer; Porter,” are inherently related, are goods that may emanate from a single source, may be produced and sold by the same entity, and travel in the same unrestricted channels of trade. More is not necessary. For these reasons, we find the relationship between the goods and their channels of trade also favor a finding of likelihood of confusion.

C. Balancing the Factors

In conclusion, we have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. While we recognize there are differences between the goods, when used with the identical mark SAND CREEK, we find that the relationship between wine and beer and the overlapping channels of trade make confusion likely.

Decision: The refusal to register Applicant’s mark SAND CREEK is affirmed.